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Supreme Court, U.S.
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JOSEPH F. SPANIOL, JR.
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NO._____

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1987

CARL L. POSCHWATTA,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR COMMON LAW WRIT OF CERTIORARI TO THE COURT OF APPEALS FOR THE NINTH CIRCUIT

SAMUEL COON
315 West Pine Street
Missoula, Montana 59802
(406) 542-1433

Attorney for Petitioner

QUESTIONS PRESENTED

1. Whether the trial court, erred in precluding petitioner from questioning IRS Agents as to whether IRS had made tax returns for petitioner under § 6020(b), Title 26, United States Code, concerning the years in question?

2. Whether under the confrontation clause of the Sixth Amendment the trial court erred in precluding petitioner from questioning the psychiatrist of the government about an out-of-court statement of opinion by the psychiatrist made to the effect that he was convinced that the petitioner believed that the IRS would make the petitioner's tax returns for him? The psychiatrist had been permitted to testify that although he recognized that the petitioner had a mental disorder, the petitioner, nonetheless, was able to formulate the requisite intent for failure to make a tax return.

3. Whether the trial court erred in precluding petitioner from explaining or extenuating a previous tax conviction which the Government was allowed to introduce against the petitioner?

4. Whether during the years in question, a criminal investigation was ongoing sub rosa, although never formally acknowledged by IRS, thereby giving petitioner sufficient grounds under the Fifth Amendment to have declined, to make tax returns until he was clear of criminal investigation?

5. Whether the trial court erred when, over objection, it received in evidence the Government's summary charts rather than to have allowed the charts simply to be used as testimonial aids?

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III. JURISDICTION

Jurisdiction to grant the common law writ of certiorari to the Court of Appeals, sought by petitioner herein, is conferred on this Court by the provisions of §1254(1), Title 28 United States Code, and Rule 17(a) of the Rules of this Court.

IV. STATEMENT OF THE CASE

A. PROCEDURAL

1. This petition is filed pursuant to the authority vested in this Court by the provisions of § 1254 (1), Title 28, United States Code, and Rule 17 (a) of this Court, to review the judgment of the Court of Appeals below, entered on October 13, 1987, in which the judgment of conviction of petitioner was affirmed.1/

Petitioner was tried by a jury in United States District Court For the Western District of Washington, at Seattle, the Honorable Donald S. Voorhees presiding, for having failed to make Income Tax Returns for the years 1980, 1981 and 1982, in violation of § 7203, Title 26 United States Code, a misdemeanor carrying a maximum

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1/ The names of all parties to this proceeding appear in the caption of the case. Herein, references to the trial transcript are denominated "RT", and references to the District Court Clerk's transcript "CT".

penalty of imprisonment for one year and a fine of $10,000.2/

A three-count information had been filed on November 8, 1985, wherein it was alleged that the defendant had received gross income for those years in the amounts of $35,000. $45,000, and $33,000, respectively.

Trial of the case initially began on February 10, 1986. The jury commenced its deliberations on February 12, 1986. On February 13, 1986, the trial judge declared a mistrial on the ground that the jury was deadlocked and unable to reach a unanimous verdict.

The case was set for retrial, commencing on July 7, 1986. On July 10, 1986, the jury began its deliberations. On July 11, 1986, the jury returned verdicts of guilty as to each count. On August 15,

---

2/ In 1982 the maximum fine was increased by Congress to $25,000, and this was applicable to petitioner for that year.

1986, judgment was pronounced and sentence was imposed. Petitioner received the maximum sentence of imprisonment (one year) on counts I and II, to be served consecutively, and a one year sentence as to count III. With respect to the latter count only, the sentence was suspended and petitioner was placed on probation for a period of five years. Thus, a two-year term of imprisonment has been imposed in this case. (CT 1-6).

Petitioner filed a notice of appeal of his conviction and was ~~relea~~sed pending the outcome of that appeal. (CT 6). On October 13, 1987, the Court of Appeals entered its judgment affirming the judgment of conviction of the District Court. On November 13, 1987, the Court of Appeals filed an order which stayed the issuance of its mandate pending petitioner's application to this Court for a writ of certiorari.

Petitioner, accordingly, remains at liberty on bail.

2. Copies of the Court of Appeals opinion wherein the judgment of conviction pronounced by the District Court is affirmed are set forth in the Appendix to this petition, the same being officially reported in 829 F.2d 1477 (9th Cir. 1987).

3. There are also included in the Appendix hereto the text of constitutional provisions and statutes cited herein.

B. FACTS

The petitioner is an airline pilot who had been employed by Western Airlines (now Delta), for nearly twenty years. He is an high school graduate and has no college training. (RT 382-385).

During January of 1979, petitioner was convicted of having submitted to his employer a W-4 form (Employees Certificate of Allowances), which claimed 99 allowances, in violation of

§7205, Title 26, United States Code, a misdemeanor. Revenue Agent Renee Putrich was the cooperating Revenue Agent in that prosecution.3/ Thus, in 1981, when Putrich telephoned petitioner and told him that certain deductions claimed on his returns for the years 1975 through 1979, were being rejected, petitioner assumed that Putrich was participating in a second criminal investigation. (RT 177-178, 406).

Petitioner had consulted with three attorneys concerning the advisability of filing tax returns when one is under criminal investigation. Petitioner was advised to provide no information to IRS until the criminal investigation ceases. (RT 399).

3/ In criminal prosecutions a Revenue Agent routinely is assigned by IRS to assist the Special Agent in the development of the case.

For the year 1980, petitioner had in excess of $10,000 in Federal Income Tax withheld from his wages, and certain deductions to which he was entitled, which may have resulted in his having no tax liability for that year. (RT 144-146, 454).

During 1981, 1982 and 1983, IRS agents in an apparent civil capacity questioned petitioner by telephone and elicited incriminating statements (RT 253-256, 259, 274-279, 281, 294). Thereafter in 1983, petitioner's case formally was referred to the Criminal Investigation Division. (RT 259, 267, 291-294).

Prior to trial, psychiatrists for both parties examined petitioner and diagnosed a mental condition described as an adjustment disorder with disturbance of conduct. Petitioner's witness James Salmon, M.D., testified that in his opinion the defendant was not able to formulate the

requisite intent specified for failure to make a tax return. Respondent's witness, C. Richard Johnson, M.D., however, testified to the contrary as to this point. (RT 328, 596).

Following his clinical examination of petitioner and prior to trial, Dr. Johnson said that he (Johnson) believed that the petitioner believed that the IRS would make his tax returns for him. Dr. Johnson said that this was his personal opinion and he did not intend to so testify at trial. On cross-examination at trial of Dr. Johnson counsel for petitioner sought to question Dr. Johnson concerning this extra-judicial statement and thereby discredit him but was precluded by the trial judge from doing so. (RT 6-7, 602-604).

Petitioner sought to testify in extenuation or explanation of a prior tax conviction which he had suffered. He was precluded from so testifying by the trial judge. (RT 388-390).

V. REASONS RELIED ON FOR ALLOWANCE OF THE WRIT

1. The petitioner testified that he believed that IRS was obligated under the law to make returns for him if he did not do so. He further testified that he believed, albeit erroneously, that such a preparation of returns by the IRS would have relieved him of his personal obligation to make returns. (RT 438-442). In fact, the IRS did prepare substitute returns in this case (CT 61), but as a matter of law this did not relieve petitioner of his personal obligation to make returns. However, a taxpayer may choose to adopt as his own returns prepared by IRS and thereby fulfill his obligation for making returns. United States v. Lacey, 658 F.2d 396, 397 (5th Cir. 1981).

Petitioner's belief that the preparation of returns by IRS would fulfill his own obligation to do so was erroneous under the law. However, if he held that belief in good faith, then he did not

violate the law. Thus, the jury was instructed as follows:

> "If you find that at the time the tax returns in question were due defendant honestly and in good faith believed that the existing laws of the United States did not require him to make and file an income tax return, then his failure to make and file a return would not be willful and you must acquit him." (RT 616-617).

If the jury in conformity with that instruction, had become persuaded that the petitioner believed that the IRS had prepared returns in his case, and that the petitioner honestly and in good faith believed he thus was relieved of his own obligation to make returns, then the jury, would have been required to have returned a verdict of not guilty because someone who thinks he is complying with the law cannot be said to be "willfully" violating it. United States v. Carlson, 617 F.2d 518, 523 (9th Cir. 1980). With reference to "good faith belief" it is one's subjective, as distinguished from objective, state

of mind which must be judged by the jury. United States v. Burton, 737 F.2d 439, 443 (5th Cir. 1984), United States v. Goetz, 746 F.2d 705, 712 n.9 (11th Cir. 1984), United States v. Aitken, 755 F.2d 188, 198 (1st Cir. 1985). The "taxpayer's good faith is a question of fact" for the jury to determine. United States v. Turk, 722 F.2d 1439, 1440 (9th Cir. 1984).

Thus, it was error for the trial judge to have precluded petitioner from questioning IRS agents as to whether they had made tax returns in this case for the years in question. They did make such returns (CT 61) and that evidence would have enhanced petitioner's credibility immeasurably.

Why did the petitioner wish to rely, if he could do so, upon the IRS to make returns for him during the years in question? He wished to do so because he believed that he was under criminal investigation by IRS and had been advised by

his attorneys not to make returns until he knew that he was clear of criminal investigation. (RT 356-357, 561).

2. Although formally designated a civil investigation, a criminal investigation of petitioner was undertaken sub rosa in 1980 because petitioner had received a suspended sentence relative to his conviction in 1979 for having filed a W-4 form for the year 1975 wherein it was alleged that he had claimed 99 allowances. IRS became disgruntled with this result. (RT 226-233, 401-402, 406).

The "civil" investigation came to the direct attention of petitioner on May 26, 1981, when Revenue Agent Renee Putrich questioned petitioner concerning tax returns which he had filed. As a result of this contact with Putrich, petitioner assumed that he again was being investigated criminally. His chief ground for this

belief was that Agent Putrich was the cooperating Revenue Agent in his previous criminal prosecution two and a half years earlier. (RT 177-178, 406, 458, 527).

Accordingly, believing that he was under criminal investigation, petitioner supplied no information to IRS, i.e., he made no tax returns in reliance upon the Fifth Amendment right against self-incrimination. A defendant may not be convicted for an erroneous claim of this privilege asserted in good faith. Garner v. United States, 424 U.S. 648, 663 n. 18, 96 S.Ct. 1178, 47 L.Ed.2d 370 (1976). Further, petitioner, as previously noted, believed that in such cases, under § 6020 (b), Title 26 United States Code, the IRS would make the tax returns. In part, of course, that belief was true. However, the making of returns by IRS pursuant to that section does not fulfull the taxpayer's obligation to do so. United States v. Lacey, 658

F.2d 396, 397 (5th Cir. 1981).

3. Dr. Johnson was not called as a witness by the Government in the first trial. The jury in that trial was unable to reach a unanimous verdict. Consequently, a mistrial was declared and the case was reset for a second trial. Prior to the commencement of the second trial, the Government filed a Motion In Limine To Prohibit Improper Questioning of Plaintiff's Psychiatric Expert Witness. The trial judge granted that motion whereby defense counsel was ordered to ask no questions of the Government's psychiatrist, C. Richard Johnson, M.D., concerning the statement the psychiatrist made to the attorney for the Government to the effect that it was his personal opinion that the defendant actually believed that he was not required to file tax returns because the Internal Revenue Service was going to do so on his

behalf. Dr. Johnson said that he would not give this testimony in Court because it was his personal opinion and not his professional opinion.(RT 6-7, 602-604). It was error for the trial judge to grant a motion in limine precluding petitioner's counsel from cross-examining the psychiatrist with respect to this statement.

Although impeachment of a witness by means of a prior contradictory statement of fact has long been permitted, impeachment of a witness by means of a prior contradictory expression of opinion has had to overcome much confusion and misunderstanding on the part of the courts. But the courts never have had any hesitation about permitting a prior statement of opinion to contradict opinion testimony. This is permitted everywhere.4/ 41 Cornell Law Quarterly 224, 239

4/ This is to be distinguished from the attempt to contradict a statement of fact by a prior contradictory statement of opinion.

(1956). Accord Mc Cormick, Evidence, § 35 (1954). As a preliminary matter, however, the court must be persuaded that the statements are indeed inconsistent. United States v. Hale, 422 U.S. 171, 176, 95 S. Ct. 2133, 45 L.Ed. 2d 99, 104 (1975).

Proof that a witness had made a previous statement of opinion, which in the strict sense would not amount to an impeachment, may nonetheless be inquired of not necessarily to discredit or question the veracity of the witness, "but to test to some extent the value of his opinion." People v. Donovan, 43 Cal. 162, 165-166 (1872). Justice Holmes, in Liddle v. Old Lowell Nat. Bank, 158 Mass. 15, 32 N.E. 954 (1893), said that a doctor may be cross-examined as to statements which are "more or less inconsistent with his testimony,... . An inconsistency need not be expressed in contradictory propositions; it is

enough if the implications of what has been said tend in a different direction from what is sworn to." The data on which an expert rests his specific opinion may be inquired into fully on cross-examination. 3A Wigmore, Evidence, (Chadbourn rev. 1970) § 992. "Indeed, so far as concerns cross-examination as distinguished from extrinsic proof, impeachment as to prior inconsistent statements is proper even with respect to 'collateral' matters 'which the witness has testified to on direct or cross.'" (Citations omitted). United States v. Barash, 365 F.2d 395, 401 (2d Cir. 1966).

The jury was instructed relative to the importance of evidence of the petitioner's state of mind as follows:

> "In determining whether defendant did or did not act willfully, you should consider all the evidence in the case which bears upon defendant's state of mind." (RT 617).

In United States v. Gillis, 773 F.2d 549, 554 (4th Cir. 1985), the Court noted:

"We have recognized the importance of developing the factual basis of psychiatric testimony regarding mental responsibility ... and have granted prosecutors wide latitude in cross-examining expert witnesses on the issue ... ." (Citations omitted).

The Sixth Amendment provides a defendant with the right "to be confronted with the witnesses against him." This is known as the confrontation clause. Possibly the most critical component of that clause is the right of cross-examination. Douglas v. Alabama, 380 U.S. 415, 418, 85 S. Ct. 1074, 1076, 13 L.Ed.2d 934 (1965). The clause was designed "to bring out facts that discredit the witness by showing that his testimony-in-chief was untrue or biased." Alford v. United States, 282 U.S. 687, 691, 51 S.Ct. 218, 219, 75 L.Ed. 624 (1931), Davis v. Alaska, 415 U.S. 308, 316, 94 S.Ct. 1105, 1110, 39 L.Ed.2d 347 (1973). Denial or significant diminution of the right of confrontation calls into question the

ultimate integrity of the fact-finding process and requires that the competing interest be closely examined. Chambers v. Mississippi, 410 U.S. 284, 295, 93 S.Ct. 1038, 1046, 35 L.Ed.2d 297 (1973).

Thus, it was error for the trial court to preclude petitioner's counsel from questioning the psychiatrist relative to the foundation of his opinion that petitioner suffered from an adjustment disorder yet was nonetheless able to formulate the requisite intent to fail to make tax returns. Particularly poignant would have been questions such as, "Did the adjustment disorder which you diagnosed cause the defendant to believe that IRS would file tax returns for him? Was that belief of the defendant a product of rational thinking? How could the defendant hold that view and simultaneously be able to formulate the intent of willfully failing to make tax returns? Why did you say that you would not testify in

Court that you believe that the defendant believed that IRS would file his returns? Did you say you would not so testify because you felt it would weaken the Government's case?"

Petitioner's counsel, of course, was denied the opportunity to ask any questions whatsoever of this tenor which could have discredited the psychiatrist's opinion. The excluded opinion was at variance with the opinion the witness expressed on the stand, Thus, the trial court impermissibly restricted cross-examination which in fairness should have been allowed.

4. Evidence of petitioner's prior tax conviction, Exhibit 29, was admitted in evidence.5/ In 1979

5/ Convictions of misdemeanors not inherently wicked are not usable for impeachment. Clawans v. District of Columbia, 61 App. D.C. 298, 299, 62 F.2d 383, 384 (1933). Here, however, that evidence was admitted to show knowledge and intent. Fed. R. Evid. 404(b). Irrespective of whether the evidence was admitted for impeachment or knowledge and intent purposes, the prejudice to the petitioner was the same.

petitioner had been convicted of having submitted to his employer a false W-4 Form, Employees Withholding Allowance Certificate, for the year 1975 wherein it was alleged that he had claimed 99 allowances in violation of §7205, Title 26. When petitioner attempted to explain the basis upon which that form was submitted, he was precluded from doing so. (RT 388-390). Although petitioner should not have been permitted to retry the previous case, he should have been permitted briefly to explain or extenuate the conviction or even simply deny guilt. United States v. Boyer, 80 D.C. App. 202, 150 F.2d 595, 596 (D.C. Cir. 1945). Accord Mc Cormick, Evidence, § 43 (1954), Wigmore, Evidence, (Chadbourn rev. 1972) § 1117(3).

5. Notwithstanding the timely objections of petitioner's counsel, the trial judge improperly admitted in evidence Exhibits 65, 66, and 67,

summary charts which portrayed schedules of income for the petitioner for the years in question. Counsel did not object to the charts being used in the customary fashion as testimonial aids for the Government's expert witness to utilize in illustrating his testimony before the jury. It was the admitting in evidence of the exhibits themselves which did not comport with the law and to which objection was made. (RT 299-301). The rule governing such matters has been quite clearly stated in United States v. Soulard, 730 F.2d 1292, 1300 (9th Cir. 1984), as follows:

> "The trial court should allow the charts to be used as a testimonial aid for the witnesses and as a visual aid for counsel in argument, but should not admit the charts as evidence or allow their use by the jury deliberations."

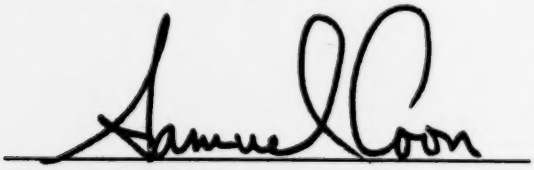
Note that the Court in Soulard, in support of the foregoing, cites United States v. Abbas, 504 F.2d 123 at 125 (9th Cir. 1974).

VI. CONCLUSION

Wherefore, petitioner prays that this Court issue a common law writ of certiorari to the United States Court of Appeals for the Ninth Circuit.

Dated this11th day of December A.D. 1987.

Respectfully submitted,



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Attorney for Petitioner

CERTIFICATE OF SERVICE

I, Samuel Coon, a member of the Bar of the Supreme Court of the United States and counsel of record for Carl L. Poschwatta, petitioner herein, hereby certify that on this date, pursuant to Rule 33, Rules of the Supreme Court, I served three copies of the annexed Motion For Leave To File Petition and Petition, For Common Law Writ Of Certiorari To The Court Of Appeals For The Ninth Circuit on each of the parties herein, by depositing such copies in the United States Post Office, Missoula, Montana, with first class postage prepaid, properly addressed to the post office addresses of the Solicitor General, the above-named respondent's counsel of record, and to the United States Attorney, as follows:

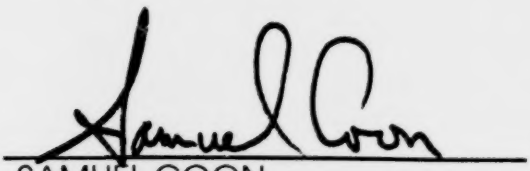
Solicitor General
Department of Justice
Washington, D.C. 20530

Milton J. Carter, Jr.
Special Assistant U.S. Attorney
3600 Seafirst Fifth
Avenue Plaza
800 Fifth Avenue
Seattle, Washington, 98104

All parties required to be served have been served.

Dated this 11th day of December A.D. 1987.

Respectfully submitted,



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APPENDIX A

I. Official Report of Opinion Below, United States v. Carl L. Poschwatta, 829 F.2d 1477 (9th Cir. 1987).

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

UNITED STATES OF AMERICA,	)	
	)	NO. 86-3162
Plaintiff-Appellee,	)	
	)	D.C. NO.
v.	)	CR-85-328-V
	)	
CARL L. POSCHWATTA,	)	
	)	OPINION
Defendant-Appellant.	)	
	)	

Argued and Submitted
June 2, 1987 - Seattle, Washington

Filed October 13, 1987

Before Cecil F. Poole, Warren J. Ferguson and
William C. Canby, Jr., Circuit Judges.

Opinion by Judge Ferguson

Appeal from the United States District Court
for the Western District of Washington
Donald S. Voorhees, District Judge, Presiding

SUMMARY

TAXATION

Appeal from conviction. Affirmed.

Appellant Poschwatta was tried and convicted in 1978 for filing a false and fraudulent withholding certificate. By 1981, he had failed to file a return for the year 1980. An IRS agent notified Poschwatta to review the documents he used as a basis for returns filed. Poschwatta claims that he believed he was under criminal investigation at this time. Poschwatta consulted with attorneys, and he claims that they advised him not to file returns if he was under criminal investigation. In 1985, Poschwatta was charged with willfully failing to file federal income tax returns. The second trial resulted in verdicts of guilty.

(1) The offense of failure to file an income tax return comprises three elements. (2) Poschwatta claims that the government failed to prove willfulness, the third element. (3) He was aware of

his legal obligation to file returns, and his failure to file was willful. (4) Paschwatta (sic) argues that certain exhibits were improperly admitted into evidence. (5) The charts contributed to the clarity of the presentation to the jury and were a reasonable method of presenting evidence. (6) Federal law requires the trial court to conduct a voluntariness hearing with respect to any confessions made by the defendant which are offered into evidence. The court correctly concluded that the statute contemplated custodial interrogation and that telephone conversations did not come within the scope of the statute. (7) Poschwatta objected to the admission of a letter from the IRS to him indicating that the IRS had not received a tax return from Poschwatta. (8) The letter reveals that Poschwatta was made aware of his duty to file a return and of the consequences for failure to

file. (9) This court has viewed the sealed exhibits and concludes that the undisclosed information was not material to the preparation of Poschwatta's defense or exculpatory. (10) The court did not abuse its discretion in prohibiting the cross-examination concerning the interpretation of 26 U.S.C § 6020(b). (11) The district court did not abuse its discretion in denying Poschwatta's request for a continuance to secure the attendance of an attorney who appellant claims advised him not to file tax returns. (12) The court did not abuse its discretion by refusing to allow appellant to explain the circumstances behind admitted evidence of a previous conviction. (13) When a juror had stated that she can decide a case impartially, the district court does not abuse its discretion in denying a challenge for cause.

COUNSEL

Milton J. Carter, Jr., Special Assistant U.S. Attorney, Seattle, Washington, for the plaintiff-appellee.

Samuel Coon, Missoula, Montana, for the defendant-appellant.

OPINION

FERGUSON, Circuit Judge:

Defendant-appellant Carl L. Poschwatta appeals his criminal conviction for failure to file income tax returns for the years 1980, 1981, and 1982, in violation of 26 U.S.C. § 7203. We affirm the conviction.

I

Defendant Poschwatta is an airline pilot with Western Airlines. He has been employed by Western for nearly twenty years. Appearing pro se, defendant was tried in 1978 for submitting to his employer a Form W-4 claiming 99 allowances. Defendant was convicted of filing a false and fraudulent withholding certificate

and sentenced by the district court to one-year imprisonment in January 1979. The defendant appealed the conviction to this court and the conviction was upheld. Subsequently, defendant made a Rule 35 motion to reduce his sentence. He filed an affidavit stating that he regards himself as a law-abiding citizen and that he was willing to work with the IRS to resolve his tax liability. Accordingly, defendant filed returns for the years 1975 through 1979 in July and September 1980. Shortly thereafter, defendant's sentence of one year was suspended after a hearing on the Rule 35 motion.

By April 15, 1981, however, defendant had failed to file a return for the year 1980. On April 23, 1981, defendant applied for an extension of time to file, but the application was rejected because it was not timely made.

In May 1981, Agent Renee Putrich of the IRS telephoned defendant to make an appointment to review the documents used as a basis for returns filed by defendant for the years 1975 through 1979. Agent Putrich was the cooperating Revenue Agent in the criminal investigation which resulted in defendant's criminal trial in 1978. Defendant claims that he believed Putrich was engaged in a second criminal investigation at this later date.

Prior to May 1981, defendant consulted with attorneys concerning whether he should file returns if he was under criminal investigation. Defendant claims that two attorneys advised him not to file returns if he was under criminal investigation. Thus, defendant did not provide information to the IRS.

In April 1982, defendant failed to file an income tax return for 1981. In April 1983, defendant

failed to file in income tax return for the 1982 tax year. Federal income tax was withheld from defendant's wages for the years 1980, 1981, and 1982, in the following amounts: $10,511.97, $6,624.91, and $2,825.92, respectively.

On November 8, 1985, defendant was charged in a three-count information with willfully failing to file federal income tax returns for the calendar years 1980, 1981, and 1982, in violation of 26 U.S.C. § 7203, a misdemeanor. The information alleged that defendant received gross income of $35,000 in 1980, $45,000 in 1981, and $33,000 in 1982.1/

This case was tried twice before the district court. The first trial ended when the jury was unable to reach a unanimous decision. The court declared a mistrial and scheduled a retrial

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1/ Washington is a community property state. These figures represent half of the wages received by defendant, who is married.

of the case. The second trial resulted in verdicts of guilty as to each of the counts. The judgment and commitment were entered on August 15, 1986. Defendant timely filed a notice of appeal.

II.

Defendant argues that there was insufficient evidence to support his conviction. Evidence is sufficient if, viewed in the light most favorable to the government, "any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt." Jackson v. Virginia, 443 U.S. 307, 319 (1979) (emphasis in original); United States v. Buras, 633 F.2d 1356, 1359 (9th Cir. 1980) (omitting italics).

(1) The offense of failure to file an income tax return under 26 U.S.C. § 7203 comprises three elements. The government must prove that the taxpayer was required to file a return, that the

taxpayer failed to file, and that the failure to file was willful. See Buras, 633 F.2d at 1358. Willfulness in criminal tax violations means a voluntary, intentional violation of known legal duty. United States v. Pomponio, 429 U.S. 10, 12 (1976) (per curiam).

(2) Defendant claims that the government failed to prove willfulness, the third element of the crime. Defendant argues that he was not acting willfully because he was advised by his attorney not to file returns. See United States v. Carlson, 617 F.2d 518, 523 (9th Cir.) (defendant's good faith assertion of an invalid Fifth Amendment claim would defeat § 7203 requirement of willfulness), cert. denied, 449 U.S. 1010 (1980). The government introduced substantial evidence to rebut this claim. The government established that defendant failed to file returns in the past, had applied for

extensions of time, and knew the possible criminal penalties.

(3) The jury heard testimony from two attorneys. The attorneys testified that they told defendant not to sign anything or make any admissions until defendant knew that he was clear of criminal prosecution. The jury apparently weighed this evidence and defendant's contention that he relied on these statements and similar advice from his own attorney, against the government's evidence. It was reasonable for the jury to have concluded that Poschwatta was aware of his legal obligation to file returns, and that his failure to file was willful. See Buras, 633 F.2d at 1359.

Defendant also presented evidence that he lacked the intent necessary to commit the crime. Defendant's expert witness, psychiatrist Dr. James Salmon, testified that defendant

suffered from a mental condition known as "adjustment disorder with disturbance of conduct," which prevented defendant from formulating the specific intent of willfulness. The government's expert witness, Dr. C. Richard Johnson, testified that defendant had the capacity to formulate the intent necessary for committing the crime. In weighing this evidence, a rational trier of fact could conclude that Poschwatta had the necessary intent to willfully fail to file tax returns. Thus, the evidence was sufficient to support the verdict.

III.

The standard of review concerning the district court's evidentiary rulings is abuse of discretion. United States v. Soulard, 730 F.2d 1292, 1996 (9th Cir. 1984).

A

(4) Defendant argues that Exhibits 65, 66, and 67, charts which portrayed schedules of income

for the defendant for the years 1980, 1981, and 1982, were improperly admitted into evidence over his objections.

(5) Although the better practice may have been for the court to allow the charts to used as testimonial aids only, the district court did not abuse its discretion. See United States v. Abbas, 504 F.2d 123 (9th Cir. 1974), cert. denied, 421 U.S. 988 (1975). The figures in the government chart already were admitted into evidence and the defendant did not challenge the figures. Defendant also had a full opportunity to cross examine the witness. The charts arguably contributed to the clarity of the presentation to the jury and were a reasonable method of presenting evidence. See United States v. Gardner, 611 F.2d 770, 776 (9th Cir. 1980).

B.

(6) Defendant argues that "various extrajudicial statements" were admitted by the trial judge over his objections, in violation of 18 U.S.C. § 3501. § 3501(a) requires the trial court to conduct a voluntariness hearing with respect to any confessions made by the defendant which are offered into evidence. Confession is defined as "any confession of guilt of any criminal offense or any self-incriminating statement made or given orally or in writing." 18 U.S.C. § 3501(e). The district court denied defendant's request for a voluntariness hearing with regard to statements Poschwatta made to IRS agents over the telephone. Interpreting the application of § 3501, the court concluded that the statute contemplated custodial interrogation and that telephone conversations did not come within the scope of the statute.

We review de novo the district court's statutory interpretation. United States v. Binder, 769 F.2d 595, 600 (9th Cir. 1985). We find that section 3501(d) upholds the district court's conclusion. Since defendant was not under arrest or other detention when he made the statements, the court did not err in failing to conduct a voluntariness hearing. The statements were properly admitted into evidence.

C.

(7) Defendant also objected to the admission of government Exhibit 23, a letter from the IRS to defendant, dated May 13, 1977, that indicated that the IRS had not received a tax return from the defendant for the year 1976. Specifically, defendant objected on the grounds that the letter set forth penalties and punishments for violation of 26 U.S.C. § 7203.

Defendant requested that the court excise this material before admitting it in evidence. The court overruled this objection and admitted in evidence the complete letter. Defendant made similar objections as to Exhibits 21, 24, and 24-A. The court also overruled these objections.

(8) Conviction for failure to file an income tax return requires proof of willfulness. 26 U.S.C. §7203. Willfulness in criminal tax violations means a voluntary, intentional violation of a known legal duty. Pomponio, 429 U.S. at 12. The letters explained that the documents the defendant filed were not valid returns and that criminal penalties for failure to file were possible. The court admitted the information regarding notice given to the taxpayer. The court did not abuse its discretion. The letter reveals that the defendant was made aware of his duty to file a return and of the consequences for failure to file.

D.

Defendant argues that the IRS was pursuing a criminal investigation of him during 1980, 1981, and 1982. Defendant testified at trial that he invoked his Fifth Amendment right against self-incrimination and did not file returns because he believed he was being criminally investigated. 2/ Defendant objected to the district court's refusal to allow disclosure of two internal government memoranda which were sealed as court exhibits. Defendant contends that the court should have disclosed these documents, because the documents were exculpatory and would show that the IRS was conducting an ongoing criminal investigation during 1980,

2/ Defendant argues that the IRS became disgruntled upon learning that the judge suspended his sentence for his earlier conviction and that the IRS was determined to prosecute him again. According to defendant, the IRS began a criminal investigation of him in 1980, in a second attempt to convict him.

1981, and 1982.3/ The trial court concluded that the material was not exculpatory and did not come within the ambit of Federal Rule Criminal Procedure 16.

(9) We have viewed the sealed exhibits and conclude that the undisclosed information was not material to the preparation of defendant's defense or exculpatory within the meaning of the term as set forth in Brady v. Maryland, 373 U.S. 83 (1963).

We also conclude that defendant's limited access to the documents did not deny him

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3/ Even assuming this was true, defendant was required to file his returns. In United States v. Sullivan, 274 U.S. 259, 263 (1927) the Court held that the privilege against compulsory self-incrimination was not a defense to prosecution for failing to file a return. However, a defendant may not be convicted for an erroneous claim of privilege asserted in good faith. See Garner v. United States, 424 U.S. 648, 663 n. 18 (1976); Carlson, 617 F.2d at 523.

effective impeachment of Mr. Williams, the Chief of Criminal Investigation Division who approved the criminal investigation in 1983.

Finally, defendant claims that the court should have admitted in evidence the complete content of the documents under Federal Rule of Evidence 106. Rule 106 provides that when a writing is introduced by one party, an adverse party may require him to introduce at that time any other part or any other writing which ought in fairness to be considered contemporaneously with it. We find that the district court was not required to introduce contemporaneously the complete documents because failure to do so was not misleading. See United States v. Dorrell, 758 F.2d 427, 434-35 (9th Cir. 1985).

IV.

Limitation of the scope of cross-examination by the trial court is reviewed on appeal for abuse of discretion. United States v. Wellington, 754 F.2d 1457, 1468 (9th Cir.), cert. denied, 106 S.Ct. 593 (1985).

After a pretrial motion in limine the district court disallowed cross-examination of the IRS employees on the requirements of 26 U.S.C. §6020(b) following the IRS agents' testimony that the defendant was required to make tax returns for the years 1980, 1981, and 1982. The court concluded that defendant's questions would have invaded the duty of the court by having witnesses testify on the meaning of section 6020(b). Section 6020(b) provides that when a person fails to make a return "the Secretary shall make such return from his own knowledge and from such information as he can obtain through testimony or otherwise." The court allowed defendant to testify, however, that he believed

that the IRS had a duty to make returns for him under § 6020(b).

(10) The court did not abuse its discretion in prohibiting the cross-examination concerning the interpretation of § 6020(b). The court acts as the jury's sole source of the law. Cooley v. United States, 501 F.2d 1249, 1253 (9th Cir. 1974), cert. denied, 419 U.S. 1123 (1975). Furthermore, the district court properly interpreted section 6020(b). The Secretary of Treasury's execution of a return on behalf of a taxpayer does not relieve the taxpayer of his obligation to file a return. Moore v. Commissioner, 722 F.2d 193, 196 (5th Cir. 1984); Pascoe v. IRS, 580 F. Supp. 649, 653 (E.D. Mich. 1984), affd, 755 F.2d 932 (6th Cir. 1985) (mem.).

The court also ruled, in a pretrial motion in limine, that defense counsel could not cross-examine Dr. C. Richard Johnson, the

government's rebuttal witness, as to his personal opinion regarding whether defendant believed that the IRS would file a return for him. The court properly precluded defense counsel from cross-examining Dr. Johnson concerning his personal opinion. Dr. Johnson was testifying as an expert witness. The district court correctly noted that Dr. Johnson was in no better position than the jury to come to this conclusion.4/

V.

Defendant requested a continuance of four days duration to secure the attendance of Bernard Goldman, an attorney who defendant claims advised him not to file tax returns if he was

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4/ Cross-examination on this issue also was not relevant to Dr. Johnson's credibility, as defendant suggests. Dr. Johnson's personal opinion regarding defendant's belief that the IRS would file tax returns for him was not inconsistent with his professional opinion that defendant was mentally capable of filing income tax returns.

under criminal investigation by the IRS. The decision to grant or deny a continuance is within the discretion of the trial judge, and the decision will only be overturned on a showing of abuse of discretion. United States v. Domina, 784 F.2d 1361, 1373 (9th Cir. 1986), cert. denied, 107 S. Ct. 893 (1987). Defendant argues that the district court abused its discretion in denying the continuance.

(11) We conclude that the district court did not abuse its discretion in denying the continuance. The jury heard testimony from two of defendant's attorneys to the same effect. See United States v. Basile, 569 F.2d 1053, 1058 (9th Cir.), cert denied, 436 U.S. 920 (1978) (no abuse of discretion to deny motion for continuance where testimony would be cumulative and repetitive).

VI.

Defendant argues that the district court erred in allowing into evidence defendant's prior conviction under the tax code and in not permitting defendant to explain the conviction or deny guilt. The district court allowed the prior conviction in evidence to show that defendant was required by law to file income tax returns.

(12) Although evidence of a previous conviction involving dishonesty or false statements is admissible only during cross-examination to attack the credibility of a witness, Fed. R. Evid. 609(a), evidence of other crimes is generally admissible to show knowledge and intent. Fed. R. Evid. 404(b). The court did not abuse its discretion by refusing to allow defendant to explain the circumstances behind the previous conviction. The court stated that Mr. Poschwatta was found guilty at that trial and that

he would not retry the case. We find that the court properly refused to divert the jury's attention from the current case to a collateral matter.

VII.

Defendant argues that the judge should have disqualified juror Helen Ferrelli and that the court's failure to disqualify Ferrelli violated his Sixth Amendment right to an impartial jury. The district court has broad discretion in determining the competency of jurors and that judgment will not be disturbed on appeal absent an abuse of discretion. United States v. Sears, 663 F.2d 896, 900 (9th Cir. 1981), cert denied, 455 U.S. 1027 (1982).

(13) During voir dire, Ferrelli stated that she felt strongly about excuses for failing to file tax returns. However, Ferrelli also stated that she could be impartial. When a juror has stated that she can decide a case impartially, this circuit

has ruled that the district court did not abuse its discretion in denying a challenge for cause. Bashor v. Risley, 730 F.2d 1228, 1236-37 (9th Cir.), cert denied, 469 U.S. 838 (1984).

VIII.

The district court did not abuse its discretion in the rulings made at trial. The evidence sufficiently supports the verdict. Therefore, the conviction is AFFIRMED.

B. CONSTITUTIONAL PROVISIONS AND STATUTES

1. CONSTITUTIONAL PROVISIONS

FIFTH AMENDMENT

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use without just compensation.

SIXTH AMENDMENT

In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the assistance of Counsel for defence.

26 USCS § 6020(b)

Returns prepared for or executed by Secretary.

(b) Execution of return by Secretary.

(1) Authority of Secretary to execute return. If any person fails to make any return (other than a declaration of estimated tax required under section 6015) required by an internal revenue law or regulation made thereunder at the time prescribed therefor, or makes, willfully or otherwise, a false or fraudulent return, the Secretary shall make such return from his own knowledge and from such information as he can obtain through testimony or otherwise.

26 USCS § 7203

§ 7203. Willful failure to file return, supply information, or pay tax.

Any person required under this title to pay any estimated tax or tax, or required by this title or by regulations made under authority thereof to make a return (other than a return required under authority of section 6015), keep any records, or supply any information, who willfully fails to pay such estimated tax or tax, make such return, keep such records, or supply such information, at the time or times required by law, be guilty of a misdemeanor and, upon conviction thereof, shall be fined not more than $10,000, or imprisoned not more than 1 year, or both, together with the costs of prosecution. (Aug. 16, 1954, ch 736, 68A Stat. 851; June 28, 1968, P.L. 90-364, Title I, § 103(e)(5), 82 Stat. 264.)

26 USCS § 7205

§7205. Fraudulent withholding exemption certificate or failure to supply information.

Any individual required to supply information to his employer under section 3402 who willfully supplies false or fraudulent information, or who willfully fails to supply information thereunder which would require an increase in the tax to be withheld under section 3402, shall, in lieu of any other penalty provided by law (except the penalty provided in section 6682), upon conviction thereof, be fined not more than $500, or imprisoned not more than 1 year, or both. (Aug. 16, 1954, ch 736, 68A Stat. 852; Mar.15, 1966, P.L. 89-368, Title I, Section 101(e)(5), 80 Stat. 62.)